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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

MICHAEL A. JONES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF THE NATIONAL CAPITAL AREA, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does it violate due process of law to confine a person acquitted of a criminal offense by reason of insanity ("acquittee") involuntarily and indefinitely in a mental institution without requiring the Government to bear the burden of establishing that the person is currently mentally ill and likely to be dangerous to himself or others in the reasonable future?

2. Does it deny an acquittee the equal protection of the laws to confine him involuntarily and indefinitely in a mental institution without affording him the same procedural protections that are available to all other persons facing involuntary commitment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICI CURIAE	1
STATEMENT	2
A. The Statute	2
B. The Facts	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. SECTION 301(d) DEPRIVES INSANITY ACQUITTEES OF LIBERTY WITHOUT DUE PROCESS OF LAW	9
A. Section 301(d) Violates the Principle That No Person May Be Deprived of His Liberty Unless The Government Bears the Burden of Establishing That The Deprivation Is Justified	9
B. There Is No Constitutionally Adequate Justification For Shifting the Burden of Proof to the Person Sought To Be Confined	10
1. The Shift in the Burden Cannot Be Justified by the Verdict of Not Guilty By Reason of Insanity	10
2. The Shift in the Burden Cannot Be Justified By Invoking a Presumption of Continuing Insanity and Dangerousness	11
3. The Shift in the Burden Cannot Be Justified By Asserting an Overriding Interest in Protecting Society From Acquittees	17

TABLE OF CONTENTS—Continued

Page

II. SECTION 301(d) DENIES INSANITY ACQUITTEES THE EQUAL PROTECTION OF THE LAWS 19

A. Section 301(d) Denies Acquittees Important Procedural Protections Available in Civil Commitment Proceedings 20

B. There Is No Constitutionally Adequate Justification For Denying Acquittees Important Procedural Protections Afforded to Civil Committees 21

1. The Governmental Interests Are the Same in Both Cases 21

2. An Acquittee's Prior Criminal Act Does Not Justify Denying Him Procedural Protections Available to All Civil Committees, Including Prior Criminal Offenders 22

C. Petitioner Was Denied Equal Protection By Being Involuntarily Confined Without a Procedurally Adequate Commitment Hearing for Longer Than the Maximum Sentence He Could Have Served if Convicted 24

CONCLUSION 25

TABLE OF AUTHORITIES

CASES: Page

Addington v. Texas, 441 U.S. 418 (1979) 7, 9, 18
Allen v. Radack, 426 F. Supp. 1052 (D.S.D. 1977) .. 8
Bailey v. Alabama, 219 U.S. 219 (1911) 12
Baxstrom v. Herold, 383 U.S. 107 (1966) ..... *passim*
Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980) 17
Bethea v. United States, 365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977) 2
Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) 12, 13
Chase v. Kearns, 278 A.2d 132 (Me. 1971) 8
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 12
County Court v. Allen, 442 U.S. 140 (1979) 12
Curry v. Overholser, 287 F.2d 137 (D.C. Cir. 1960) 13
Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971) 15
Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) 2
Holderbaum v. Watkins, 42 Ohio St. 2d 372, 328 N.E.2d 814 (1975) 8
Hough v. United States, 271 F.2d 458 (D.C. Cir. 1959) 12, 13, 21
Humphrey v. Cady, 405 U.S. 504 (1972) 9, 20, 21, 23
In re Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (en banc) 8
In re Nelson, 408 A.2d 1233 (D.C. 1979) 4
In re Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979) 8
In re Winship, 397 U.S. 358 (1970) 9, 19
Jackson v. Indiana, 406 U.S. 715 (1972) 7, 8, 19, 20
Jones v. United States, 432 A.2d 364 (D.C. 1981) .. 3, 4, 11, 20, 21, 22
Kovach v. Schubert, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975) 8
Leary v. United States, 395 U.S. 6 (1969) 12, 14, 17
McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) 5, 8

TABLE OF AUTHORITIES—Continued

	Page
Mills v. State, 256 A.2d 752 (Del. 1969)	8
Nishikawa v. Dulles, 356 U.S. 129 (1958)	10
O'Beirne v. Overholser, 193 F. Supp. 652 (D.D.C. 1961), *rev'd*, 302 F.2d 852 (D.C. Cir. 1962)	12
People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974)	8
Schneiderman v. United States, 320 U.S. 118 (1943)	9
Specht v. Patterson, 386 U.S. 605 (1967)	7
Speiser v. Randall, 357 U.S. 513 (1958)	10, 12, 21
Stanley v. Illinois, 405 U.S. 645 (1972)	12
State v. Clemons, 110 Ariz. 79, 515 P.2d 324 (1973) (en banc)	8
State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975)	8, 17
Vitek v. Jones, 445 U.S. 480 (1980)	8, 9, 25
Vlandis v. Kline, 412 U.S. 441 (1973)	12
Waite v. Jacobs, 475 F.2d 392 (D.C. Cir. 1973)	21
Warren v. Harvey, 472 F.Supp. 1061 (D.Conn. 1979), *aff'd*, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980)	12, 13
Wilson v. State, 259 Ind. 375, 287 N.E.2d 875 (1972)	8
Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966)	9, 19

STATUTORY PROVISIONS:

D.C. Code §§ 21-541 *et seq.* (1981)	4
D.C. Code § 21-544 (1981)	4
D.C. Code § 21-545 (1981)	4
D.C. Code § 21-545(b) (1981)	4, 22
D.C. Code § 22-103 (1981)	4
D.C. Code § 22-2202 (1981)	4
D.C. Code § 24-301(a) (1981)	5
D.C. Code § 24-301(d)	*passim*
D.C. Code § 24-301(d)(1) (1981)	3, 5
D.C. Code § 24-301(d)(2) (1981)	5, 10
D.C. Code § 24-301(d)(2)(A) (1981)	3, 5

TABLE OF AUTHORITIES—Continued

	Page
D.C. Code § 24-301(d)(2)(B) (1981)	3
D.C. Code § 24-301(e) (1981)	22
BOOKS AND ARTICLES:	
American Psychiatric Association, Clinical Aspects of the Violent Individual (1974)	16
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TABLE OF AUTHORITIES—Continued

Page

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M. Wolfgang, R. Figlio & T. Sellin, Delinquency in a Birth Cohort (1972) 15

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a non-partisan, non-profit membership organization dedicated to the protection of civil liberties through a vigorous defense of the fundamental principles embodied in the Bill of Rights. The American Civil Liberties Union Fund of the National Capital Area ("Fund") is the Washington, D.C. area litigation arm of the ACLU. The ACLU and the Fund have frequently appeared in this Court and in other courts, as counsel for the parties and as *amici*, in cases raising due process and equal protection challenges to Federal and State governmental actions that curtail personal liberty.

This case challenges the constitutionality of the District of Columbia's statutory procedures for the involuntary and indefinite institutionalization of persons acquitted of criminal offenses on the ground of insanity. The decision below upheld those procedures. Affirmance of that decision would significantly curtail the liberty of acquittees in the District of Columbia, as well as in other jurisdictions that employ similar procedures.[1] Affirmance would also undermine the constitutional right to personal liberty generally, by holding—for the first time ever in peacetime—that the Government need not bear the burden of justifying the involuntary confinement of its citizens. We are therefore submitting this brief urging reversal of the decision below.[2]

STATEMENT

A. The Statute

In the District of Columbia, any person charged with a criminal offense—whether misdemeanor or felony—may plead not guilty by reason of insanity. At the time petitioner came to trial, a person raising the insanity defense had to prove, by a preponderance of the evidence, that his crime was a "product of mental disease or mental defect."[3]

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[1] *See* Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605, 605-06 nn. 4 & 5 (1981).

[2] The parties have consented to our filing this brief. Their letters of consent have been filed with the Clerk.

[3] *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954). On September 27, 1976, the District of Columbia Court of Appeals abandoned the *Durham* test and adopted the so-called ALI test, in which the accused must prove, by a preponderance of the evidence, that at the time of the offense (1) he was suffering from a mental disease or defect, and (2) as a result of the disease or defect, he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *Bethea v. United States*, 365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977).

The analysis in this brief would apply with equal force if the ALI test had been in effect at the time of petitioner's trial.

Under Section 301(d) of Title 24 of the District of Columbia Code (hereinafter "Section 301(d)"), every person acquitted of a criminal offense solely on the ground that he was insane at the time of the offense (an "acquittee") "shall be committed to a hospital for the mentally ill until such time as he is eligible for release . . . ." Section 301(d)(1). The commitment is mandatory and automatic; the acquittee does not receive a pre-commitment hearing.

In lieu of a pre-commitment hearing, an acquittee is entitled to receive, within 50 days after his confinement commences, a hearing "to determine whether he is entitled to release from custody." Section 301(d)(2)(A). The acquittee is entitled to release if the court finds that the acquittee either (1) has recovered his sanity or (2) will not in the reasonable future be dangerous to himself or others.[4]

There is no jury at a release hearing; the court determines the issues and makes findings of fact and conclusions of law. Section 301(d)(2)(B). Nor does the Government bear the burden of proof at a release hearing: "The person confined shall have the burden of proof." *Id.* Thus, the mandatory and automatic post-acquittal commitment will continue indefinitely unless the acquittee carries the burden of proving current sanity or lack of dangerousness.

These same two criteria—current mental state and likelihood of danger to self or others—are also the statutory criteria for civil commitment determinations in the

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[4] Although these criteria are set forth in Section 301(e), the District of Columbia Court of Appeals has construed Section 301(d) as incorporating them. *See Jones v. United States*, 432 A.2d 364, 372 n.16 (D.C. 1981).

District of Columbia.[5] Civil commitment procedures, however, differ substantially from the procedures at a Section 301(d) release hearing. A civil commitment proceeding involves a two-stage process. Whenever civil commitment is sought, the D.C. Commission on Mental Health is required to hold a hearing at which the respondent has the right to counsel, to testify and present evidence, and to cross-examine witnesses. Based upon the evidence adduced at this hearing, the Commission makes an initial determination of commitability *vel non*. D.C. Code §§ 21-541 through 544. If the Commission determines that the respondent is currently mentally ill and likely to cause injury unless confined, the respondent has a statutory right to a *de novo* jury trial on both issues. *Id.* §§ 21-544 and 545. He may not be committed unless the jury finds that he is both currently mentally ill and likely to injure himself or others unless confined. *Id.* § 21-545(b). The party seeking the commitment bears the burden of proof on both points and at both stages.[6]

B. The Facts

Petitioner was arrested on September 19, 1975, while trying to shoplift an overcoat in a department store. He was 20 years old at the time.

Petitioner was charged with attempted petit larceny—a misdemeanor carrying, upon conviction, a maximum jail term of one year. D.C. Code §§ 22-103, 22-2202. At his arraignment, petitioner was committed to St. Elizabeths Hospital for a period of observation directed to determin-

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[5] *See* D.C. Code §§ 21-541 *et seq.*; *Jones v. United States*, 432 A.2d at 372 & n.16.

[6] On its face, the statute is silent on the burden of proof in civil commitment proceedings. It is nevertheless settled that the burden of proof rests with the party seeking to commit. *See, e.g., In re Nelson*, 408 A.2d 1233 (D.C. 1979) (clear and convincing evidence required).

ing his competency to stand trial. *See* D.C. Code § 24-301(a). On March 1, 1976, the hospital reported to the Superior Court that petitioner was competent and that, despite evidence of a mental disorder, he did not require inpatient hospitalization.

In a non-jury proceeding on March 12, 1976, the trial court entered a judgment of not guilty by reason of insanity on the basis of stipulated facts concerning the offense and petitioner's mental condition at the time of the offense. Petitioner was thereupon automatically committed to St. Elizabeths pursuant to Section 301(d)(1).

Petitioner's release hearing pursuant to Section 301(d)(2) was held on May 25, 1976.[7] The court found that petitioner was currently mentally ill and dangerous, and it denied him release.

On November 29, 1976, petitioner moved for release or, in the alternative, a civil commitment hearing, on the ground that his confinement in St. Elizabeths had exceeded the maximum term he could have served had he been found guilty of the misdemeanor. The motion was denied, and this case arises from petitioner's appeal of the denial.

SUMMARY OF ARGUMENT

Section 301(d) permits an acquittee to be confined in a mental hospital involuntarily, and kept there indefinitely, without requiring the Government ever to shoulder the burden of proving that he is presently mentally ill and

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[7] As we understand it, petitioner does not challenge here the power of the Government to detain him following acquittal for a brief period—such as the 50 days provided in Section 301(d)(2)(A)—for observation to permit the Government to decide whether it should institute civil commitment proceedings. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249 (1972).

dangerous, as it must to commit any other person involuntarily. That Section also denies an acquittee the right to have a jury decide whether he is presently ill and dangerous, which is a right provided to all others under the District of Columbia civil commitment statute.

Section 301(d) violates a fundamental tenet of due process—that a person may not be deprived of his liberty unless the Government bears the burden of justifying the deprivation. This constitutional defect cannot be cured by invoking a presumption, triggered by the insanity acquittal, of continuing mental illness and dangerousness. The factors relevant to involuntary commitment are not explored at a criminal trial. Moreover, available evidence indicates that mental illness is often not of a continuing nature and that acquittees only infrequently engage in subsequent dangerous behavior. Nor can the defect be justified as a measure needed to protect society from the truly dangerous.

Section 301(d) also denies acquittees the equal protection of the laws, because it deprives them of important procedural protections available in civil commitment proceedings. This discriminatory treatment cannot be justified by any relevant differences between acquittees and civil committees. The Government has the same interests with respect to both groups—to provide treatment for the mentally ill and to protect society from persons likely to be dangerous. This Court has held that a conviction does not justify confining a mentally ill offender beyond his sentence term without affording him a civil commitment hearing. It is irrational to treat acquittees differently.

ARGUMENT

Petitioner is a young man who was arrested for trying to shoplift a coat. Acquitted by reason of insanity at the time of the offense, he was automatically and involuntarily confined in a mental institution pursuant to Section 301(d) of Title 24 of the D.C. Code. Petitioner is still there. He has been there now for six years, even though the maximum prison term he could have served if convicted is only one year.

Under Section 301(d), the Government has never had to shoulder the burden of justifying petitioner's involuntary confinement, even though the Government must shoulder that burden in civil commitment proceedings. Moreover, petitioner has never been afforded a jury determination on the issues of current mental illness and dangerousness, even though a jury determination on these issues is available as a matter of right in civil commitment proceedings. These features render Section 301(d) unconstitutional.

This Court has not hesitated to strike down procedures for indeterminate and involuntary confinement when they do not sufficiently safeguard protected liberty interests, or when they impermissibly discriminate between different classes of persons. Thus, in *Addington v. Texas*, 441 U.S. 418 (1979), the Court held that civil commitment procedures violate due process unless they require the State to carry the burden of proving current mental illness and dangerousness by clear and convincing evidence. And in *Baxstrom v. Herold*, 383 U.S. 107 (1966), the Court held that it denies equal protection for the State to commit a convicted offender to a mental institution at the end of his prison term without affording him the procedural protections of a civil commitment proceeding.[8]

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[8] The Court has struck down other such procedures in *Specht v. Patterson*, 386 U.S. 605 (1967); *Jackson v. Indiana*, 406 U.S. 715

The Court has not yet addressed the constitutionality of procedures governing post-trial commitment of persons acquitted on a plea of not guilty by reason of insanity. Nevertheless, the Court has noted that other courts have followed *Baxstrom* in cases involving commitment following an insanity acquittal. *See Jackson v. Indiana*, 406 U.S. at 724.[9]

This case, involving petitioner's confinement for an indeterminate period that has already far exceeded the maximum prison sentence he could have received, presents the question whether the District of Columbia's procedures for commitment following an insanity acquittal pass muster under the due process and equal protection clauses. The Court should hold that the procedures violate both clauses.

(1972); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972); and *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980).

Most of these decisions (including *Baxstrom*) were unanimous. In none of them did any Justice dissent on the merits of the constitutional holding.

[9] Since *Jackson*, additional courts have followed *Baxstrom* in constitutional challenges to post-acquittal commitment procedures. *E.g., Allen v. Radack*, 426 F. Supp. 1052, 1057-58 (D.S.D. 1977); *State v. Clemons*, 110 Ariz. 79, 515 P.2d 324 (1973) (en banc); *Wilson v. State*, 259 Ind. 375, 287 N.E.2d 875 (1972); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974); *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975); *Holderbaum v. Watkins*, 42 Ohio St. 2d 372, 328 N.E.2d 814, 815 (1975) (per curiam); *Kovach v. Schubert*, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975). *But see In re Franklin*, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (en banc); *Mills v. State*, 256 A.2d 752 (Del. 1969); *Chase v. Kearns*, 278 A.2d 132 (Me. 1971); *In re Torsney*, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

I. SECTION 301(d) DEPRIVES INSANITY ACQUITTEES OF LIBERTY WITHOUT DUE PROCESS OF LAW.

A. Section 301(d) Violates the Principle That No Person May Be Deprived of His Liberty Unless The Government Bears the Burden of Establishing That The Deprivation Is Justified.

Involuntarily confining an acquittee unquestionably curtails liberty interests protected by the due process clause. Protected liberty interests are implicated when a convicted and currently incarcerated criminal offender is involuntarily transferred from prison to a mental hospital. *Vitek v. Jones*, 445 U.S. 480, 487-91 (1980). *A fortiori*, protected liberty interests are implicated when the Government seeks to confine, involuntarily and indefinitely, a person who was acquitted by reason of insanity and is thus not under sentence. Such confinement is "a massive curtailment of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (footnote omitted). It "constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. at 425.

It is a fundamental principle of due process that the Government may not curtail an individual's protected liberty interests without first carrying the burden of showing that the curtailment is justified. This principle is implicit in the Court's prior holdings that, in a variety of situations, the Government may not infringe a person's protected liberty interests unless it establishes justification by a strict standard of proof.[10] The principle is fur-

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[10] *See, e.g., Addington v. Texas*, 441 U.S. 418 (1979) (State must establish civil commitability by clear and convincing evidence); *In re Winship*, 397 U.S. 358 (1970) (Government must establish guilt beyond a reasonable doubt in juvenile delinquency proceedings); *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966) (Government must establish grounds for deportation by clear and convincing evidence); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (Government must establish grounds for denaturalization by clear and convincing evi-

ther supported by *Speiser v. Randall*, 357 U.S. 513 (1958), which held that a statute violated due process by placing the burden of proof on an individual, rather than on the Government, on an issue that implicated "an interest of transcending value." *Id.* at 525.

The District of Columbia procedure for the post-trial confinement of acquittees violates this principle by relieving the Government of its burden of justifying the confinement and by imposing on acquittees the burden of establishing that they are entitled to be free. For this reason, Section 301(d) denies acquittees due process of law.

B. There Is No Constitutionally Adequate Justification For Shifting the Burden of Proof to the Person Sought To Be Confined.

None of the reasons advanced by the court below or the Government suffices to justify imposing on an acquittee the burden of proving that his involuntary confinement is not warranted.

1. *The Shift in the Burden Cannot Be Justified by the Verdict of Not Guilty By Reason of Insanity.*

The court below erred in viewing a release hearing under Section 301(d)(2) as a mere "updating" of the verdict of not guilty by reason of insanity. *See* 432 A.2d at 373. The verdict involves a finding that, at the time the accused committed the act, he was suffering from a mental disease or defect, and that the act was a product of the disease or defect. By contrast, the inquiry in a Section 301(d)(2) release hearing is whether, at the time

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dence); *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (Government must prove grounds for expatriation by clear and convincing evidence).

While these cases all involved the question of what standard of proof the Government must meet, in each case there was no question that the Govenrment—and not the individual—bears the burden of proof.

of the hearing, the acquittee is mentally ill and likely to be dangerous in the reasonable future. The two inquiries are different; the latter therefore cannot "update" the former.

Because the verdict focuses on the defendant's mental state at the time of the criminal act, it may or may not be probative of whether the acquittee is mentally ill at the time of the release hearing. *See* pp. 12-13, *infra*. More importantly, because probable future dangerousness is not an issue at the trial, no finding as to probable dangerousness is inherent in a verdict of not guilty by reason of insanity. To be sure, the facts relating to the past act may constitute evidence bearing on probable future dangerousness (*see* p. 18, *infra*), but the inquiry into dangerousness is a very different one from the inquiry undertaken at the criminal trial.

For these reasons, the court below was wrong in asserting that a Section 301(d) release hearing is "an updating process to determine how present mental status compares with earlier findings which had been urged by the defendant himself . . . ." 432 A.2d at 373, *quoting* 396 A.2d at 189. There are no such "earlier findings." Shifting the burden of proof to the acquittee cannot be justified on that basis, and to do so would be arbitrary. *See Baxstrom v. Herold*, 383 U.S. at 114 n.5.

2. *The Shift in the Burden Cannot Be Justified By Invoking a Presumption of Continuing Insanity and Dangerousness.*

The court below also sought to justify the allocation of the burden of proof in a Section 301(d)(2) release hearing by invoking mandatory rebuttable presumptions of continuing insanity and dangerousness triggered solely by the fact of acquittal on insanity grounds. *See* 432 A.2d at 371, 374. But constitutional requirements may not be so easily side-stepped:

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a

> statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

Speiser v. Randall, 357 U.S. at 526, *quoting Bailey v. Alabama*, 219 U.S. 219, 239 (1911).

Presumptions, even if rebuttable, violate due process "unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States*, 395 U.S. 6, 36 (1969); *see also County Court v. Allen*, 442 U.S. 140, 165 (1979).[11] The presumptions of continuing mental illness and dangerousness fail this test.

The presumption of continuing insanity is unsupportable. A determination that an acquittee suffered from a mental illness at the time he committed a criminal act does not by itself support an inference that he will still be suffering from that illness at the time of the release hearing. Many months, and sometimes years, may pass between the commission of the criminal act and the trial,[12] not to mention the release hearing,[13] and all or part of

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[11] The Court has also held that irrebuttable statutory presumptions which effectively curtail personal liberty violate the due process clause. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644-46 (1974) (presumption that woman five months pregnant cannot teach safely or effectively violates Due Process Clause); *Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (invalidating presumption of nonresidency for tuition purposes); *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that unwed father is unfit parent invalid).

[12] *See, e.g., Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968) (14 months between offense and trial); *Hough v. United States*, 271 F.2d 458 (D.C. Cir. 1959) (more than one year between indictment and trial); *O'Beirne v. Overholser*, 193 F. Supp. 652 (D.D.C. 1961) (10 months between offense and trial), *rev'd*, 302 F.2d 852 (D.C. Cir. 1962).

[13] *E.g., Warren v. Harvey*, 472 F. Supp. 1061 (D. Conn. 1979) (34 months between arrest and commitment hearing after trial),

that time may be spent in treatment.[14] Some mental illnesses are of short duration,[15] and many illnesses, including various psychotic illnesses, respond well to drug treatment and can be quickly and effectively brought under control.[16]

The presumption of continuing dangerousness also lacks foundation. When Congress enacted the present statutory scheme, it did not cite any empirical evidence indicating that mentally ill persons who have committed a criminal act are likely to commit additional dangerous acts in the future. In fact, the relevant available evidence strongly suggests that only a small percentage of persons who are found to be mentally ill and have engaged in past criminal behavior commit additional criminal or violent acts.[17] And it certainly cannot be said with "substantial as-

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affirmed, 632 F.2d 925 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980); *Curry v. Overholser*, 287 F.2d 137 (D.C. Cir. 1960) (more than 15 months between indictment and commitment).

[14] *E.g.*, *Warren v. Harvey*, *supra*, 472 F. Supp. at 1063 (two years in hospital); *Bolton v. Harris*, *supra*, 395 F.2d at 645 (five months in hospital undergoing chemo- and psychotherapy, discharged as recovered); *Curry v. Overholser*, *supra*, 287 F.2d at 138 (13 months in hospital to restore competency), *Hough v. United States*, *supra*, 271 F.2d at 459 (11 months in hospital to restore competency).

[15] For example, "[o]ver 80 per cent of patients [suffering from schizophrenic psychoses] who require admission to hospital will be discharged in the first year of treatment." L. Kolb, Modern Clinical Psychiatry 421 (9th ed. 1977). Manic-depressive psychotic reactions often respond effectively to drug treatment from 3 to 21 days after treatment begins. *Id.* at 464. In severe cases, requiring electroshock therapy, many patients recover after three to four weeks of treatment. *Id.* at 466. Even if it is untreated, an average manic-depressive episode will last only six to nine months, with individual cases being much shorter. *Id.* at 464.

[16] *See* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 Rutgers L. Rev. 1011, 1019 & n.33 (1976) (citing authorities).

[17] *See* pp. 14-16, *infra*.

surance" that the presumption of future dangerousness is more likely than not to flow from the fact of a prior acquittal by reason of insanity. *Cf. Leary v. United States*, 395 U.S. at 36.

In recent years, impressive empirical evidence has been collected concerning the likelihood that mentally ill persons who have committed criminal acts will commit harmful acts in the future.[18] The uncontradicted evidence shows that only a relatively small percentage of such persons will either be rearrested or readmitted to mental institutions as a result of dangerous or violent behavior. For example, Steadman and Keveles studied 967 patients transferred from two New York State hospitals for the criminally insane to civil mental hospitals in 1966 as the result of this Court's decision in *Baxstrom*.[19] Of those 967 patients, 246 were released into the community within the four-year follow-up period of the study; and out of a sample of 121 of them, only 21 (or 17.4 percent) were subsequently arrested, and only two (or 1.7 percent) were convicted of felonies.[20] Similar findings were reported by Thornberry and Jacoby,[21] who studied 586 patients transferred from a Pennsylvania hospital for the criminally

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[18] Methodological difficulties unavoidably handicap investigation of the actual subsequent dangerousness of persons acquitted by reason of insanity. Although some acquittees may be released to the community shortly after acquittal, substantial numbers of acquittees are committed to mental institutions and, as a result, have no real opportunity to demonstrate their actual dangerousness or non-dangerousness. Therefore, the best available evidence of the actual dangerousness of acquittees is found in follow-up studies of both acquittees and prisoners formerly confined in mental hospitals and since released into the community.

[19] Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 Am. J. Psychiatry 304 (1972).

[20] *Id.* at 307, 310.

[21] T. Thornberry & J. Jacoby, The Criminally Insane: A Community Follow-up of Mentally Ill Offenders (1979).

insane to civil mental hospitals.[22] Prior to the transfers, staff recommendations had been made that the patients could not be cared for in less secure civil hospitals and would be dangerous if released to the community.[23] Nevertheless, of the 414 patients released into the community during the four-year follow-up period of the study, only 98 (or 23.7 percent) were subsequently arrested,[24] and only 60 (or 14.5 percent) were arrested for a violent act or rehospitalized as a result of violent behavior.[25]

These studies and others[26] demonstrate the correctness of the conclusion of a 1974 report of the American Psy-

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[22] The transfers resulted from a federal court decision that the commitments had been unconstitutional. *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971).

[23] T. Thornberry & J. Jacoby, *supra*, at 23.

[24] *Id.* at 179.

[25] *Id.* at 190.

[26] In relative terms, as well, mentally ill persons who have committed criminal acts are not particularly likely to commit additional criminal acts in the future as compared with other groups in the population. While Steadman and Keveles observed a subsequent arrest rate of 17.4 percent, and Thornberry and Jacoby found a subsequent arrest rate of 23.7 percent (and violent behavior rate of 14.5 percent) among former mental patients who had committed criminal acts, Giovannoni and Gurel observed that approximately 14 percent of former civil mental patients were involved in "socially disruptive behavior" in the four years after release. Giovannoni & Gurel, *Socially Disruptive Behavior of Ex-Mental Patients*, 17 Arch. Gen. Psychiatry 146, 147-48 (1967). By way of further comparison, Gottfredson and his associates found an overall recidivism rate, including rearrest and parole violation, for paroled prisoners of 25 percent in the first year after release. D. Gottfredson, M. Neithercutt, J. Nuffield & V. O'Leary, Four Thousand Lifetimes: A Study of Time Served and Parole Outcomes (1973), cited in T. Thornberry & J. Jacoby, *supra*, at 185. And Wolfgang and his associates discovered that 12.7 percent of all males studied were apprehended for at last one serious offense before they reached 17 years of age. M. Wolfgang, R. Figlio & T. Sellin, Delinquency in a Birth Cohort 125 (1972).

chiatric Association's Task Force on Clinical Aspects of the Violent Individual that

> "[F]ollow-up studies of patients discharged from psychiatric hospitals, have given mixed results, but none would indicate any likely potential for violence on the basis of psychiatric disorder." [27]

Beyond this, the available literature also shows that even when trained professionals attempt to predict the future dangerousness of mentally ill offenders on the basis of individualized, multivariate data, they substantially overstate the number of persons that will actually engage in violent or criminal behavior in the future.[28] *A fortiori*, a blanket, undifferentiated presumption that all insanity acquittees will engage in dangerous behavior in the future is a vast overstatement. Indeed, even assuming that as many as 25 percent of all acquittees would actually be dangerous in the future (a more pessimistic assumption than any of the available data supports), the presumption

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[27] American Psychiatric Association, Clinical Aspects of the Violent Individual 30 (1974).

[28] *See, e.g.*, T. Thornberry & J. Jacoby, *supra*, at 195; Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L.Rev. 1084 (1976); Steadman, *Follow-Up on Baxstrom Patients Returned to Hospitals for the Criminally Insane*, 130 Am. J. Psychiatry 317 (1973); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 Crime & Delinquency 371 (1972); Hunt & Wiley, *Operation Baxstrom After One Year*, 124 Am. J. Psychiatry 974 (1968); *see also* American Psychiatric Association, *supra*, at 25 ("Psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders."); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U.Pa.L. Rev. 439, 447 (1974) ("One can only conclude that psychiatrists . . . tended to over-predict dangerousness greatly, by a factor somewhere between ten and a hundred times the actual incidence of dangerous behavior."); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 Arch. Gen. Psychiatry 397, 397-98 (1972) ("Even in the most careful, painstaking, laborious and lengthy clinical approach to the prediction of dangerousness, false positives may be at a minimum of 60% to 70%.").

of continuing dangerousness would still be incorrect 75 percent of the time—or three times as often as it would be correct.

For both of these reasons, the presumption of continuing dangerousness plainly fails to satisfy the due process requirement of *Leary v. United States*, *supra*, that the presumed fact must flow from the proven fact "more likely than not." [29]

3. *The Shift in the Burden Cannot Be Justified By Asserting an Overriding Interest in Protecting Society From Acquittees.*

Finally, the Government argues that the shift in the burden of proof can be justified by balancing the requirements of due process against an asserted governmental interest in not "reopen[ing] the 'revolving door' by which persons proven both dangerous and mentally ill escape both punishment and treatment." [30] This argument is wrong because (as discussed at pp. 10-11, *supra*) acquittees

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[29] Relying upon much of the empirical evidence cited herein, the Supreme Court of New Jersey invalidated a New Jersey statutory procedure for the commitment of acquittees that required only a finding of continuing insanity and not dangerousness as well. *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975). The court held that the statute violated due process and equal protection, in part, by presuming future dangerousness based solely upon present mental illness and past criminal conduct, a presumption that the court found unwarranted:

> "The fact that defendant is presently suffering from some degree of mental illness and that at some point in the past mental illness caused him to commit a criminal act, while certainly sufficient to give probable cause to inquire into whether he is dangerous, does not, in and of itself, warrant the inference that he presently poses a significant threat of harm, either to himself or to others."

344 A.2d at 295 (footnote omitted); *see also Benham v. Edwards*, 501 F. Supp. 1050 (N.D. Ga. 1980).

[30] Brief of United States in Opposition to Petition for Certiorari ("Br. in Opp.") at 17.

have not been proven either currently mentally ill or dangerous. Beyond that, the argument has other serious flaws.

Requiring the Government to carry the burden of justifying confinement will not open any "revolving door." It will not create an "exclusionary rule" or otherwise disable the Government in any way from demonstrating the need to commit any acquittee. The Government will remain free to introduce all relevant evidence at the release hearing, including, for example, expert psychiatric evidence, evidence concerning the nature of the offense, and evidence of violent propensities, other criminal or antisocial behavior (both before and after the crime charged), and past psychiatric treatment or commitment. Thus, the Government will be fully armed to prevail in any case in which an acquittee is demonstrably mentally ill and dangerous.

There is an even more fatal flaw in the Government's reasoning. Contrary to the Government's assertion,[31] this Court has never used a "balancing analysis" based on some perceived "public interest" to relieve the Government of the burden of justifying deprivations of personal liberty during peacetime. Certainly the Court did not do so in *Addington*—the only case cited by the Government. To be sure, the Court did perform a balancing analysis in *Addington*. But the issue in that case was not whether the Government could constitutionally be relieved of the burden of proof; all parties agreed that the Government must shoulder the burden. The question in *Addington* was what standard of proof the Government must meet—preponderance, clear and convincing, or beyond a reasonable doubt. It was on that question, and that question only, that this Court balanced competing interests. *See* 441 U.S. at 427.[32]

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[31] *See* Br. in Opp. at 17.

[32] The same is true of other cases in which the Court has considered what standard of proof the Government must meet in order to carry its burden. *See* p. 9, n.10, *supra*. In none was the

We submit that the Government may never involuntarily confine its citizens without carrying the burden of affirmatively justifying the need for confinement in each case. But in any event, the Government certainly should not be allowed to balance away a fundamental constitutional freedom on the basis of vague and unsupported assertions of a "revolving door."

II. SECTION 301(d) DENIES INSANITY ACQUITTEES THE EQUAL PROTECTION OF THE LAWS.

The Equal Protection Clause forbids a state to "withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." [33] While "[e]qual protection does not require that all persons be dealt with identically, . . . it does require that a distinction made have some relevance to the purpose for which the classification is made." [34] Applying those principles, the Court has held that a statutory procedure for the involuntary commitment of mentally ill prisoners nearing the expiration of their sentences violated equal protection because it denied them the opportunity for a *de novo* jury review like that available to all other persons facing civil commitment. *Baxstrom v. Herold*, 383 U.S. at 110. The Court has also invalidated, on equal protection grounds, a statutory scheme that subjected persons charged with crimes but found incompetent to stand trial to "a more lenient commitment standard and to a more stringent standard of release" than those

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balancing directed to considering whether the burden of proof could constitutionally be shifted to the person whose liberty interests the Government was seeking to curtail. *See, e.g., In re Winship*, 397 U.S. at 365-67; *Woodby v. Immigration and Naturalization Service*, 385 U.S. at 285-86.

[33] *Jackson v. Indiana*, 406 U.S. at 727, *citing Baxstrom v. Herold*, 383 U.S. at 111.

[34] *Baxstrom v. Herold*, 383 U.S. at 111.

generally applicable to all persons not charged with criminal offenses. *Jackson v. Indiana*, 406 U.S. at 730.[35]

Section 301(d) denies equal protection to acquittees. It deprives them of important procedural protections accorded as of right in civil commitment proceedings, even though this difference in treatment cannot be justified.

A. Section 301(d) Denies Acquittees Important Procedural Protections Available in Civil Commitment Proceedings.

Acquittees in the District of Columbia are treated differently from persons civilly committed, in that acquittees must bear the burden of proof to obtain release and are not permitted a jury trial on the issues of current mental illness and dangerousness. Indeed, the disparity is even more pronounced, because civil committees are given two bites at the apple on these issues—one before the D.C. Mental Health Commission and a second before a jury—while acquittees get no bites at all.

The court of appeals erred in characterizing these procedural differences as not "substantial." *See* 432 A.2d at 373. Allocation of the burden of proof is important because a person's freedom may hinge on it, as likely occurred in this case.[36] As this Court has stated, "In all

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[35] *See also Humphrey v. Cady*, 405 U.S. 504 (1972) (remanding for evidentiary hearing petitioner's "substantial" claim that commitment for compulsory treatment under Wisconsin's Sex Crimes Act, without the jury determination available to others committed for compulsory treatment under the Mental Health Act, deprived him of equal protection of the laws).

[36] The evidence at petitioner's release hearing was in apparent conflict. The only evidence offered was the testimony of a clinical psychologist from St. Elizabeths. She testified that petitioner was "very quiet" and "pleasant, polite, kind of low key" (Transcript of May 25, 1976 Hearing, at 6); that "he carries out projects in an acceptable fashion" (*id.* at 7); that "he is positively motivated" (*id.*); that "he is very self-a-facing [sic] individual" (*id.* at 8-9)

kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. at 525 (citations omitted). *See also Waite v. Jacobs*, 475 F.2d 392, 395 (D.C. Cir. 1973).

The opportunity for a jury determination of the need for commitment is also of great importance. The jury, chosen from the community, is the best judge of who may be dangerous to the community. As this Court has recognized, the jury performs the "critical function of introducing into the [commitment] process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment." *Humphrey v. Cady*, 405 U.S. at 509.

B. There Is No Constitutionally Adequate Justification For Denying Acquittees Important Procedural Protections Afforded to Civil Committees.

1. *The Governmental Interests Are the Same in Both Cases.*

The Government has the same underlying interests in the involuntary commitment of acquittees as it does in the involuntary civil commitment of other persons—namely, to provide treatment for the mentally ill and to protect society from persons likely to be dangerous in the reasonable future. *See, e.g., Jones v. United States*, 432 A.2d at 368, *quoting Hough v. United States*, 271 F.2d 458, 461 (D.C. Cir. 1959). The identity of governmental

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who "does not create any problems" and "doesn't get into any difficulty" (*id.*); and that "[i]n short he is not always responsive in a positive way to what goes on but there are positive features" (*id.* at 7). The psychologist also stated that petitioner had had some hallucinations (*id.* at 8), and that on one occasion he "caused the therapy assistant some anxiety" by ignoring the assistant's "advice" to apply a coat of lacquer to a piece of copper craft work (*id.* at 7). She diagnosed petitioner's mental condition as "schizophrenia paranoid type" (*id.* at 9), and opined that "he is still a danger to himself and to others" (*id.*) and would try to shoplift again if released (*id.* at 10).

interests is manifested by the fact that the statutory criteria are the same in both cases—current mental illness and likely future dangerousness. *Compare* D.C. Code § 24-301(e) *with id.* § 21-545(b).

The identity of governmental interests cannot be undercut by suggesting—as the Government has done through its "revolving door" argument (*see* pp. 17-19, *supra*)—that the disadvantageous procedural treatment of acquittees is justified by a penal or punitive interest not present in the case of other persons facing civil commitment. As the court below correctly stated, "The exclusively remedial and protective goals of the statute demonstrate that a punitive rationale has no part in the commitment of persons acquitted by reason of insanity," and "the commitment scheme for acquittees is not intended to attribute any guilt or imply any social indebtedness in the excuse of a criminal offense." 432 A.2d at 369, 376. Moreover, any penal or punitive intent would be improper. As the court below again correctly stated, "Society may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense." *Id.* at 369.

2. An Acquittee's Prior Criminal Act Does Not Justify Denying Him Procedural Protections Available to All Civil Committees, Including Prior Criminal Offenders.

The fact that an insanity acquittee has been found to have committed a criminal act does not provide a rational basis for affording him fewer procedural protections during the commitment process than are available to other mentally ill persons. This Court has held that where a jury determination is "generally available to persons subject to commitment for compulsory treatment," such a determination may not constitutionally be denied to a person simply because he has been convicted of a criminal offense—even though the fact of the offense may well "be a relevant factor in evaluating his mental condition, and

in determining the type of care and treatment appropriate . . . ." *Humphrey v. Cady*, 405 U.S. at 508, *discussing Baxstrom v. Herold*, *supra*.

There is no merit to the suggestion of the court below that the discriminatory treatment of acquittees can be justified on the basis of a presumption of continuing dangerousness triggered by the commission of a criminal act.[37] Under the District of Columbia procedures, persons with prior criminal records who are no longer under sentence enjoy the full procedural protections of the civil commitment process.[38] Yet those protections are denied to persons who have been automatically confined following acquittal by reason of insanity. Thus, under the approach of the court below, petitioner loses procedural rights because he is presumptively dangerous by virtue of having tried to shoplift a coat. Yet a previously convicted rapist who has nearly completed his sentence, or an armed robber with multiple prior convictions who is not now under sentence, is not presumptively dangerous and is afforded those rights.

This result is totally irrational. Even if the presumption of continuing dangerousness did not violate due process, *see* pp. 13-17, *supra*, it would still violate equal protection because, as in *Baxstrom*, "all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears." 383 U.S. at 115.

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[37] Nor can the discriminatory treatment be justified by the erroneous assertion that the release hearing merely "updates" the trial inquiry. *See* pp. 10-11, *supra*.

[38] Civil commitment procedures are also followed in the case of individuals apprehended in connection with criminal offenses whom the apprehending authorities choose initially to divert to hospitalization rather than the criminal justice process, either on the basis of information concerning prior hospitalizations or by virtue of the nature of the criminal acts committed. *See, e.g.*, T. Thornberry & J. Jacoby, *supra*, at 189; German & Singer, *supra*, at 1023; Steadman & Keveles, *supra*, at 309.

Section 301(d) leaves petitioner in a no-man's land. Because he was found not guilty by reason of insanity, he has been denied procedural protections that are available both to persons not charged with crimes and also to persons who have been convicted. This discriminatory treatment is arbitrary and irrational, and Section 301(d) should therefore be struck down.

C. Petitioner Was Denied Equal Protection By Being Involuntarily Confined Without a Procedurally Adequate Commitment Hearing for Longer Than the Maximum Sentence He Could Have Served if Convicted.

Petitioner has now been involuntarily confined for six years as the result of being found not guilty by reason of insanity of a charge carrying a maximum sentence of one year. Yet he has never received a commitment hearing like those available to all other persons involuntarily committed in the District of Columbia.

There is no conceivable justification for this situation. Obviously the Government's "revolving door" argument cannot justify continuing to discriminate against an acquittee beyond the time when his maximum sentence would have expired. Moreover, if petitioner had been convicted of a crime, incarcerated, and then involuntarily committed as mentally ill and dangerous, he could not, under *Baxstrom*, have been confined beyond the expiration of his sentence without being afforded a full commitment hearing. But there is no rational basis for reaching different results in the two situations: the governmental interests are the same with respect to acquittees and convicted offenders who may be mentally ill and dangerous—to provide treatment and to protect society. *See* pp. 21-22, *supra*. Petitioner was therefore denied equal protection by being deprived of procedural rights that would have been available to him upon expiration of his sentence if he had been adjudged criminally responsible for his conduct.

CONCLUSION

The District of Columbia's statutory procedure for the involuntary confinement of acquittees lacks important procedural protections. In a long line of decisions beginning with *Baxstrom v. Herold* in 1966 and continuing through *Vitek v. Jones* in 1980, this Court has held that those protections cannot be denied to other individuals facing involuntary commitment to mental institutions. Affirmance of the decision below would require a substantial departure both from the holdings of those cases and from their logic. Reversal of that decision, on the other hand, would safeguard important personal liberty interests, while recognizing the Government's legitimate interest in treating persons who are mentally ill and protecting society from the truly dangerous.

Accordingly, *amici* respectfully urge the Court to reverse the judgment below.

Respectfully submitted,

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